

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Petition of AT&T Inc. for	)	
Waiver of the Commission's Rules to	)	CC Docket No. 95-116
Treat Certain Local Number Portability Costs as	)	
Exogenous Costs Under Section 61.45(d)	)	
	)	

**ORDER**

**Adopted: June 30, 2006**

**Released: July 10, 2006**

By the Commission:

**I. INTRODUCTION**

1. In this order, we address a petition filed by AT&T Inc. (AT&T) asking the Commission to waive section 61.45(d) of its rules to permit it to treat its unrecovered carrier-specific local number portability (LNP) costs as an exogenous cost adjustment and to recover such costs from end users via the end-user common line (EUCL) charge.<sup>1</sup> For the reasons set forth below, we grant AT&T's petition.

**II. BACKGROUND**

2. Section 251(b)(2) of the Communications Act of 1934, as amended (Act), requires all local exchange carriers (LECs) "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."<sup>2</sup> Number portability allows residential and business telephone customers to retain, at the same location, their existing telephone numbers when switching from one telephone service provider to another.<sup>3</sup> Congress recognized that number portability was necessary in developing competition for local exchange services because customers are reluctant to switch carriers if they must also change their telephone numbers.<sup>4</sup>

3. Section 251(e)(2) of the Act requires that the costs of establishing number portability be borne by all telecommunications carriers on a "competitively neutral basis" and vests the Commission

<sup>1</sup> Petition of AT&T Inc. for a Waiver to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d), CC Docket No. 95-116 (filed Mar. 31, 2006) (Petition). AT&T seeks relief on behalf of its Ameritech, Pacific Bell, and Southwestern Bell companies. *Id.* at 1 n.1.

<sup>2</sup> 47 U.S.C. § 251(b)(2).

<sup>3</sup> *See* 47 U.S.C. § 153(30).

<sup>4</sup> *Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701, 11702, para. 3 n.4, 7 (1998) (*Cost Recovery Order*) (citing Congressional history), *aff'd on recon.*, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578 (2002) (*Order on Reconsideration and Review*).

with authority to establish a cost recovery system that satisfies this requirement.<sup>5</sup> In the *Number Portability First Report and Order*, the Commission interpreted the statutory requirement of competitive neutrality and adopted a mechanism for recovering the costs of providing interim number portability.<sup>6</sup> In the associated further notice of proposed rulemaking, the Commission also tentatively concluded that price-cap LECs should be permitted to treat their long-term number portability costs as exogenous and to recover them through price-cap adjustments.<sup>7</sup>

4. In the subsequent May 1998 *Cost Recovery Order*, the Commission adopted the rules and standards that govern the recovery of carrier-specific costs associated with providing LNP.<sup>8</sup> In the *Cost Recovery Order*, the Commission determined that an exclusively federal cost recovery mechanism for number portability would enable it to satisfy the competitive neutrality mandate.<sup>9</sup> In addition, the Commission, reconsidering its tentative conclusion, decided that it likely would not be competitively neutral to allow recovery of such costs in interstate access charges because the costs would flow through to charges imposed on interexchange carriers (IXCs).<sup>10</sup> To avoid this result, the Commission adopted a special pricing mechanism. Specifically, the Commission determined that it was competitively neutral to allow incumbent LECs to recover their carrier-specific LNP costs through a tariffed and levelized monthly *end-user* charge, which could end no later than five years after it began.<sup>11</sup> The requirement of a “levelized” rate, which is one that remains constant over a recovery period, was implemented to protect consumers from varying rates.<sup>12</sup> The Commission explained that it chose a five-year recovery period to enable incumbent LECs to recover their costs associated with the initial implementation of LNP in a timely fashion but also to produce reasonable charges for customers and to avoid imposing them for an unduly long period.<sup>13</sup> As a result of the directives that rates be levelized and recovered over five years, incumbent LECs were obliged to estimate their total initial implementation costs, project the number of access lines they anticipated would be assessed end-user charges during the recovery period, and divide

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<sup>5</sup> 47 U.S.C. § 251(e)(2) (“The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.”).

<sup>6</sup> *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8415-24, paras. 121-40 (1996) (*Number Portability First Report and Order*) (subsequent history omitted).

<sup>7</sup> *Id.* at 8466, para. 230.

<sup>8</sup> See generally *Cost Recovery Order*, 13 FCC Rcd 11701. The Commission also delegated authority to the Chief, Common Carrier Bureau (now the Wireline Competition Bureau), to determine appropriate methods for apportioning joint costs among portability and nonportability services, and to issue any orders to provide guidance to carriers before they filed their tariffs. *Id.* at 11740, 11784, paras. 75, 167.

<sup>9</sup> *Id.* at 11720, para. 29. The Commission also determined that incumbent LECs’ number portability costs would not be subject to jurisdictional separations. *Id.*

<sup>10</sup> See *id.* at 11773, para. 135.

<sup>11</sup> *Id.* at 11776-77, paras. 142-43; see 47 C.F.R. § 52.33(a)(1). The subsequent *Cost Classification Order* provided additional LNP cost recovery guidelines to incumbent LECs, consistent with the Commission’s narrow definition of what costs qualified for special recovery through the federal LNP charge. See generally *Telephone Number Portability Cost Classification Proceeding*, CC Docket No. 95-116, Memorandum Opinion and Order, 13 FCC Rcd 24495 (Com. Car. Bur. 1998) (*Cost Classification Order*), *aff’d*, *Order on Reconsideration and Review*, 17 FCC Rcd 2578.

<sup>12</sup> *Cost Recovery Order*, 11 FCC Rcd at 11776-77, para. 143 & n.478.

<sup>13</sup> *Id.* at 11777, para. 144.

the latter into the former.<sup>14</sup> In this way, each incumbent LEC arrived at the per-line monthly LNP charge that it would assess on its end users every month for a five-year period.

5. In 1999, Ameritech, Pacific Bell, and Southwestern Bell (the AT&T LECs) filed separate tariffs to recover their carrier-specific LNP costs and, pursuant to these tariffs, began to assess monthly LNP charges on their end users.<sup>15</sup> In their tariffs, these carriers sought to recover their initial LNP implementation costs over the five-year recovery period specified in rule 52.33(a)(1), which ended in January 2004.<sup>16</sup> Following tariff investigations, the Commission found that revised LNP rates filed by Pacific Bell and Southwestern Bell were lawful and reasonable and prescribed rates for Ameritech.<sup>17</sup> For Ameritech, Pacific Bell, and Southwestern Bell, the approved charges were 28 cents, 34 cents, and 33 cents, respectively.<sup>18</sup> AT&T represents that the Commission approved combined initial LNP implementation costs totaling \$1.275 billion for these three LECs.<sup>19</sup> The forecast by these carriers of the number of access lines they expected to serve over their five-year recovery period reflected a continuous growth in lines over the recovery period.<sup>20</sup>

6. Rather than continuing to grow as the AT&T LECs had predicted, however, AT&T access lines actually declined over the five-year recovery period.<sup>21</sup> Because fewer lines were served, the end-user charges collected by AT&T amounted to substantially less than it had projected it would collect at the time it made its tariff filing. Specifically, AT&T asserts that it recovered \$211 million less for the AT&T LECs than it had projected.<sup>22</sup> Thus, on March 31, 2006, AT&T filed a petition seeking a waiver of section 61.45(d) of the Commission's rules to permit it to treat its unrecovered LNP costs as exogenous costs that it may recover through the EUCL charge.<sup>23</sup> AT&T asserts that it fully satisfies the Commission's standard for exogenous relief as its unrecovered costs were beyond its control and not accounted for in the price cap formula and, furthermore, there is good cause for a waiver because the prescribed cost recovery mechanism, for unforeseeable reasons, did not permit it full reasonable recovery of its LNP costs.<sup>24</sup>

7. **Comments.** Comments were filed by the California Public Utilities Commission and the People of the State of California (CPUC), Wayne M. Caswell, and Verizon.<sup>25</sup> The New Jersey Ratepayer

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<sup>14</sup> The incumbent LECs were required to set charges such that the present value of the revenue recovered by the charge equaled the present value of the cost being recovered, using a discount rate equal to the rate of return on investment that the Commission had authorized for regulated interstate access services. *Id.* at 11777, para. 143.

<sup>15</sup> See generally *Long-Term Number Portability Tariff Filings*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11883 (1999) (*LNP Tariff Investigation Order*).

<sup>16</sup> Petition at 5-6; see 47 C.F.R. § 52.33(a)(1).

<sup>17</sup> *LNP Tariff Investigation Order*, 14 FCC Rcd at 11886, 11961, 11962, paras. 4-5, 165-66, 168-69.

<sup>18</sup> Petition at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* (explaining that AT&T's access lines grew in 1999 and 2000 but decreased in 2001-03). AT&T states that access lines decreased by 8% from 1999-2004, compared to a 24% increase in lines that it predicted. *Id.*

<sup>22</sup> *Id.* at 7. AT&T asserts that it failed to collect 17% of its allowed recovery. *Id.*

<sup>23</sup> See *id.* at 1, 7.

<sup>24</sup> *Id.* at 1.

<sup>25</sup> See Comments of the California Public Utilities Commission and the People of the State of California in Response to AT&T Petition for Waiver (filed April 7, 2006) (CPUC Comments); Letter from Wayne M. Caswell, Founder & (continued....)

Advocate (Ratepayer Advocate) filed joint comments/reply comments, and AT&T, the National Association of Consumer Advocates (NASUCA), and the Office of the People's Counsel for the District of Columbia (OPC-DC) filed reply comments.<sup>26</sup> In their comments, the CPUC, the Ratepayer Advocate, NASUCA, and the OPC-DC point out that AT&T's petition seeks relief similar to that sought in two petitions filed on February 8, 2005 by SBC Communications Inc. (SBC), predecessor to the current AT&T.<sup>27</sup> These commenters urge the Commission to deny all of these petitions.<sup>28</sup> NASUCA argues that, in the *Cost Recovery Order*, the Commission did not guarantee that incumbent LECs would recover their LNP costs.<sup>29</sup> The Ratepayer Advocate argues that, as a price cap carrier, AT&T should be required to demonstrate that its rates are too low in order to justify the relief sought.<sup>30</sup> It also argues that AT&T's proposal may constitute impermissible retroactive ratemaking.<sup>31</sup> Further, it claims that AT&T's current petition is barred by the statute of limitations set forth in 47 U.S.C. § 415(a).<sup>32</sup> NASUCA and OPC-DC argue that AT&T's unrecovered costs do not qualify for exogenous treatment.<sup>33</sup> If exogenous treatment is allowed, the CPUC and OPC-DC urge the Commission to verify claims of unrecovered LNP costs by requiring the submission of cost studies.<sup>34</sup> The CPUC, Wayne Caswell, the Ratepayer Advocate, and NASUCA also complain about the short comment cycle in this proceeding,<sup>35</sup> which the Ratepayer Advocate and NASUCA argue violates fundamental due process.<sup>36</sup>

8. Verizon supports AT&T's petition.<sup>37</sup> Verizon argues that it would be simpler, more efficient, and more consumer friendly to allow carriers to recover their LNP implementation costs by extending the five-year end-user charge, which is the relief SBC sought in its earlier-filed waiver and

(Continued from previous page) \_\_\_\_\_  
Chief Visionary, CAZITech Consulting, to FCC (filed April 5, 2006) (Caswell Comments); Verizon's Comments in Support of AT&T's Exogenous Cost Petition (filed April 7, 2006) (Verizon Comments).

<sup>26</sup> See Comments/Reply Comments and *Ex Parte* of the New Jersey Division of the Ratepayer Advocate (filed April 10, 2006) (Ratepayer Advocate Comments); Reply Comments of AT&T Inc. (filed April 11, 2006); Reply Comments of the National Association of State Consumer Advocates (filed April 11, 2006) (NASUCA Reply); Reply Comments of the Office of the People's Counsel for the District of Columbia (OPC-DC Reply) (filed April 11, 2006).

<sup>27</sup> CPUC Comments at 2; Ratepayer Advocate Comments at 1-2; NASUCA Reply at 2; see OPC-DC Reply at 2-3. In those petitions, SBC asks the Commission, alternatively, to waive or to forbear from enforcing the rule that limits to five years the period of time in which it may impose an LNP charge on end users. See Petition of SBC Communications Inc. for Waiver of the Five-Year Recovery Period for Local Number Portability Costs Under 47 C.F.R. § 52.33(a)(l), CC Docket No. 95-116 (filed Feb. 8, 2005); Petition of SBC Communications Inc. for Forbearance Under 47 U.S.C. §160(c) from the Application of the Five-Year Recovery Period for Local Number Portability Costs Under 47 C.F.R. § 52.33(a)(l), CC Docket No. 95-116 (filed Feb. 8, 2005) (AT&T/SBC Forbearance Petition).

<sup>28</sup> Ratepayer Advocate Comments at 2-3; NASUCA Reply at 3; see CPUC Comments at 2, 6; OPC-DC Reply at 3.

<sup>29</sup> NASUCA Reply at 4 (citing *Cost Recovery Order*, 13 FCC Rcd at 11733, para. 59).

<sup>30</sup> Ratepayer Advocate Comments at 4-5.

<sup>31</sup> *Id.* at 3, 5.

<sup>32</sup> *Id.* at 3, 4 (citing 47 U.S.C. § 415(a)). The Ratepayer Advocate argues that, because the five-year recovery period ended on January 31, 2004, the statute of limitations expired on January 31, 2006. *Id.* at 4.

<sup>33</sup> NASUCA Reply at 5-8; OPC-DC Reply at 3.

<sup>34</sup> CPUC Comments at 6-8; OPC-DC Reply at 2, 5.

<sup>35</sup> CPUC Comments at 3; Caswell Comments; Ratepayer Advocate Comments at 2-3; NASUCA Reply at 2-3.

<sup>36</sup> Ratepayer Advocate Comments at 2-3; NASUCA Reply at 2-3.

<sup>37</sup> Verizon Comments at 1.

forbearance petitions.<sup>38</sup> Should the Commission, instead, decide to treat AT&T's unrecovered LNP costs as exogenous, Verizon argues that meaningful cost recovery must be made available to all wireline carriers, in order to meet the statutory non-discrimination mandate.<sup>39</sup>

### III. DISCUSSION

9. The AT&T LECs are regulated under the Commission's price cap regime, set forth in Part 61 of its rules. Under these rules, a carrier's rates are limited by a price cap index (PCI) that may be adjusted from time-to-time.<sup>40</sup> One of the ways PCIs may be adjusted is through what are known as exogenous cost adjustments. Exogenous costs generally are those triggered by administrative, legislative, or judicial action beyond the carrier's control that have not been recovered elsewhere.<sup>41</sup> Section 61.45(d) provides that exogenous costs "shall be limited to those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling."<sup>42</sup> AT&T seeks a waiver of this rule because LNP costs are not listed in the rules as costs to be accorded exogenous treatment.<sup>43</sup> Section 1.3 of the Commission's rules provides the Commission with the authority to grant waivers "if good cause therefore is shown."<sup>44</sup> Courts have interpreted this rule as requiring petitioners to demonstrate that special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest.<sup>45</sup> As discussed below, we find that the petitioner has demonstrated special circumstances warranting a deviation from the general rule of section 61.45(d). We further find that it is in the public interest to waive this rule to treat as exogenous AT&T's unrecovered carrier-specific LNP implementation costs and to recover such costs from end users through the EUCL charge.

#### A. Competitive Neutrality

10. As discussed above, whether a cost recovery mechanism is competitively neutral is a threshold question for any proposed recovery of LNP costs. Accordingly, we first consider whether recovery of these costs through the EUCL would violate the statutory requirement of competitive neutrality.<sup>46</sup> We conclude it would not. In the *Cost Recovery Order*, the Commission determined that the

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<sup>38</sup> *Id.* at 1.

<sup>39</sup> *Id.* at 4-5.

<sup>40</sup> See 47 C.F.R. §§ 61.41-61.49.

<sup>41</sup> See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6807, para. 166 (1990) (*LEC Price Cap Order*), recon. granted in part and denied in part, Order on Reconsideration, 6 FCC Rcd 2637 (1991).

<sup>42</sup> 47 C.F.R. § 61.45(d). These costs are created by such events as: the expiration of amortizations; changes in the Uniform System of Accounts; separations changes; changes in universal service fund obligations; the reallocation of regulated and nonregulated costs; tax law changes; retargeting the PCI for price cap carriers taking advantage of the low-end adjustment mechanism; inside wire amortizations; and the completion of amortization of equal access expenses. *Id.* § 61.45(d)(1); *LEC Price Cap Order*, 5 FCC Rcd at 6807, para. 166; see also *Access Charge Reform*, CC Docket No. 96-262 et al., First Report and Order, 12 FCC Rcd 15982, 16147-48, para. 379-80, clarified on recon., Order on Reconsideration, 12 FCC Rcd 10119, 10120-21, paras. 4-6 (1997), rev. denied sub nom. *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. Aug 19, 1998).

<sup>43</sup> See 47 C.F.R. § 61.45(d)(1).

<sup>44</sup> 47 C.F.R. § 1.3.

<sup>45</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>46</sup> See 47 U.S.C. § 251(e)(2).

competitive neutrality mandate was best served if incumbent LECs recovered their LNP costs through an end-user charge, rather than through charges imposed on other carriers.<sup>47</sup> There, the Commission observed that it has only two sources from which it may allow carriers to recover costs in the federal jurisdiction, specifically access charges and end-user charges.<sup>48</sup> As explained below, when the *Cost Recovery Order* was adopted, LNP costs recovered through access charges would have been recovered from IXCs.<sup>49</sup> Because it would not have been competitively neutral to allow recovery of incumbent LEC LNP costs from IXCs in interstate access charges, the Commission found an end-user charge to be the appropriate recovery vehicle. Significant regulatory changes affecting how incumbent LECs recover their costs have occurred since the *Cost Recovery Order* was released in May 1998, which now permit an exogenous cost adjustment to be recovered solely through the EUCL, a charge that is assessed only on end users. Accordingly, we find that AT&T's proposal to recover remaining LNP costs through an exogenous cost adjustment will not harm the goal of competitive neutrality because these LNP costs will be recoverable solely from end users, rather than through charges imposed upon IXCs.

11. Price cap carriers must comply with the rate structure rules contained in Part 69 of the Commission's rules that specify the rate elements that a carrier must or may assess.<sup>50</sup> The EUCL charge, the rate element for which AT&T seeks exogenous treatment, is one of the charges allowed for the recovery of common line costs. AT&T argues that its unrecovered LNP costs will not be borne by other carriers if they are recovered through the EUCL.<sup>51</sup> We agree that – for this very reason -- the EUCL is the appropriate mechanism for recovery if exogenous treatment is allowed. Specifically, this is a flat-rated charge imposed on end users to recover the interstate-allocated portion of local loop costs.<sup>52</sup> In the *Cost Recovery Order*, the Commission determined that it likely would not have been competitively neutral to allow recovery of LNP costs in interstate access charges because “number portability is not an access-related service and IXCs will incur their own costs for the querying of long-distance calls.”<sup>53</sup> That conclusion was true at that time because the price cap mechanism existing then would not have recovered LNP costs exclusively from end users. More specifically, in June 1999, when any exogenous adjustment flowing from the *Cost Recovery Order* would have been effective, the EUCL for primary residential and single business lines was capped at \$3.50.<sup>54</sup> When capped at this level, incumbent LECs were unable to recover fully their common line costs through this charge. Thus, recovery of residual common line costs – including any that might have been imposed had the Commission permitted recovery of LNP costs through access charges – would have been achieved, first, through higher non-primary residential and business EUCLs (which also were capped, albeit at higher levels), and, second, through charges imposed on long distance carriers.<sup>55</sup> Thus, because recovery of residual common line costs flowed through to

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<sup>47</sup> See *supra* paras. 4-5.

<sup>48</sup> *Cost Recovery Order*, 13 FCC Rcd at 11773, para. 135.

<sup>49</sup> See *infra* para. 11.

<sup>50</sup> 47 C.F.R. Part 69.

<sup>51</sup> Petition at 3.

<sup>52</sup> See 47 C.F.R. § 69.152. The EUCL is also referred to as the subscriber line charge (SLC). The residential and single-line business SLC is currently capped at \$6.50 per line. See *id.* § 69.152(d)(1)(D).

<sup>53</sup> *Cost Recovery Order*, 13 FCC Rcd at 11773, para. 135.

<sup>54</sup> See 47 C.F.R. § 69.152(d)(2) (1999). We assume that any exogenous adjustment that would have been ordered in May 1998 would not have been implemented until the July 1999 annual access filing.

<sup>55</sup> Specifically, loop costs were recovered through a flat-rated Presubscribed Interexchange Carrier Charge imposed by incumbent LECs on an end-user's primary interexchange carrier and through a per-minute Carrier Common Line charge imposed on carriers. See 47 C.F.R. §§ 69.153, 69.154 (1999).

IXCs, recovery of LNP costs through access charges would have increased significantly the access charges that long distance carriers would have borne. That would not have been competitively neutral.

12. Subsequently, in 2000, after a comprehensive examination of the interstate access charge and universal service regulatory regimes for price cap carriers, the Commission adopted the industry-proposed CALLS plan.<sup>56</sup> This plan represented a five-year regime designed to phase out implicit subsidies and to move toward a more market-based approach to rate setting with respect to access charges.<sup>57</sup> Among other changes implemented in the *CALLS Order*, the EUCL is now capped at \$6.50.<sup>58</sup> This increase in the EUCL cap has enabled many incumbent LECs to recover their common line costs exclusively through the EUCL. As noted, the EUCL is collected from end users alone. The AT&T LECs have asserted that, should we allow exogenous treatment of their unrecovered LNP costs, such treatment will not raise any AT&T LEC's PCI enough that the resulting EUCL will exceed the existing EUCL cap.<sup>59</sup> Thus, the exogenous adjustment would be recovered entirely through the EUCL. To achieve this result, AT&T has estimated that the exogenous cost adjustment would range from 24 to 37 cents and would last for two years in the Southwestern Bell region and one year in the Ameritech and PacBell regions.<sup>60</sup> Accordingly, we conclude that recovery of AT&T's unrecovered LNP costs through access charges does not violate competitive neutrality and we now turn to the question of whether exogenous treatment is appropriate for these costs.

### B. Exogenous Cost Treatment

13. AT&T argues that its unrecovered LNP costs are precisely the kind of costs for which exogenous treatment is appropriate. For a party to receive exogenous cost treatment, it must show that the costs for which it seeks such treatment were beyond the control of the carrier and were proper costs that have not been recovered elsewhere.<sup>61</sup> AT&T argues that its costs were incurred as the result of a government mandate and that, given the Commission's detailed LNP requirements, the amount of the costs were outside AT&T's control.<sup>62</sup> We agree. As AT&T highlights, the Commission itself signaled its own judgment as to whether LNP costs were appropriate for exogenous treatment by tentatively

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<sup>56</sup> *Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part sub nom.*, *Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5<sup>th</sup> Cir. 2001), *cert. denied sub nom.*, *Nat'l Assn' of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002).

<sup>57</sup> *CALLS Order*, 15 FCC Rcd at 12974-77, paras. 29-35.

<sup>58</sup> See 47 C.F.R. § 69.152(d); see also *CALLS Order*, 15 FCC Rcd at 12975, para. 30; *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket No. 96-262 et al., Order, 17 FCC Rcd 10868 (2002).

<sup>59</sup> See Letter from Michelle A. Thomas, Executive Director, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116, Attachment at 7-9 (filed April 10, 2006) (AT&T April 10 *Ex Parte* Letter). Under the price cap regime, the EUCL cap limits how much of a carrier's access costs may be recovered directly from end users but the PCI limits the total interstate access rates a LEC may charge. As a result, a carrier's PCI may dictate that its EUCL charge will be below the EUCL cap. Because that is true with respect to each of the AT&T LECs, these LECs' EUCLs will not exceed the existing cap even after an exogenous adjustment for the LNP costs.

<sup>60</sup> AT&T April 10 *Ex Parte* Letter at 8. The exogenous cost adjustment would be made as part of AT&T's annual access filings.

<sup>61</sup> See *LEC Price Cap Order*, 5 FCC Rcd at 6807, para. 166.

<sup>62</sup> Petition at 8.

concluding in the *Number Portability First Report and Order* that “price cap carriers should be permitted to treat as an exogenous cost any carrier-specific, number portability-specific costs they incur.”<sup>63</sup>

14. AT&T asserts that it implemented LNP and incurred associated costs solely as result of the government mandates set forth in the Act and Commission rules.<sup>64</sup> It is true that LNP was implemented, pursuant to statutory mandate, for the purpose of making it easier for telephone subscribers to change carriers.<sup>65</sup> Under similar circumstances, the Commission has allowed exogenous treatment for certain costs. Specifically, to effect 800 number portability, which enabled 800 customers to retain their 800 numbers when they changed their IXCs, the Commission required all incumbent LECs to convert simultaneously to a new 800 access data base system.<sup>66</sup> It required the implementation of the service and dictated the terms, conditions and schedule for offering it, based upon its conclusion that 800 data base service was in the public interest.<sup>67</sup> The Commission allowed incumbent LECs “to treat as exogenous the reasonable costs they incurred specifically for the implementation and operation of the basic 800 data base service.”<sup>68</sup> Under these circumstances, the Commission concluded that the reasonable costs specific to implementing basic 800 data base service were “outside the carrier’s control,” and, accordingly, could be treated as exogenous under price cap regulation.<sup>69</sup> Similarly, here, Congress determined that the implementation of LNP was in the public interest<sup>70</sup> and delegated authority to the Commission to dictate the terms, conditions, and schedule for its deployment.<sup>71</sup> Accordingly, we conclude that the AT&T LECs’ carrier-specific LNP costs were outside their control.

15. AT&T also has satisfied the second condition for receiving exogenous treatment -- that the costs to be accorded exogenous treatment are proper costs that have not been recovered elsewhere. As explained above, AT&T seeks to recover, as exogenous, costs that the Commission previously analyzed and determined to meet the LNP cost recovery standards established by the Commission in the *Cost Recovery* and *Cost Classification Orders*.<sup>72</sup> These costs were, accordingly, determined to be carrier-specific costs directly related to the implementation of LNP, and the LNP end-user charge was the sole federal mechanism the Commission provided to incumbent LECs to recover their costs. As such, the

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<sup>63</sup> Petition at 12 (quoting *Number Portability First Report and Order*, 11 FCC Rcd at 8466, para. 230). Although the Commission ultimately determined that exogenous treatment was inappropriate, it did so because of its concern that recovery of these costs would inappropriately fall on IXCs rather than end users. As noted, that is no longer a concern.

<sup>64</sup> See Petition at 10.

<sup>65</sup> See *Number Portability First Report and Order*, 11 FCC Rcd at 8354-55, para. 2.

<sup>66</sup> *Provision of Access for 800 Service*, CC Docket No. 86-10, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 at n.2, 5425, para. 19 (1991) (*800 Reconsideration and Second Supplemental NPRM*), recon. granted in part and denied in part, Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038, para. 1 (1993).

<sup>67</sup> *800 Reconsideration and Second Supplemental NPRM*, 6 FCC Rcd at 5426, 5427, paras. 23-25, 29; *Provision of Access for 800 Service*, CC Docket No. 86-10, Second Report and Order, 8 FCC Rcd 907, 911, para. 27 (1993) (*800 Rate Structure Order*).

<sup>68</sup> *800 Rate Structure Order*, 8 FCC Rcd at 911, para. 27.

<sup>69</sup> *Id.*

<sup>70</sup> See 47 U.S.C. § 251(b)(2); *Number Portability First Report and Order*, 11 FCC Rcd at 8354-55, para. 2.

<sup>71</sup> See 47 U.S.C. §§ 251(b)(2), (e)(1),(2); see also *Number Portability First Report and Order*, 11 FCC Rcd at 8370-71, paras. 36-37.

<sup>72</sup> See *supra* para. 5; see also *LNP Tariff Investigation Order*, 14 FCC Rcd at 11886-87, 11962, paras. 4-5, 168-69.

AT&T LECs were unable to recover these costs in access charges.<sup>73</sup> Accordingly, AT&T's costs are proper costs that have not been recovered elsewhere and thus qualify for exogenous treatment.<sup>74</sup>

### C. Waiver

16. We conclude that AT&T has demonstrated that allowing this recovery will serve the public interest and that good cause exists for grant of the requested waiver. As discussed above, Congress determined that implementation of LNP is in the public interest and required LECs to provide LNP in accordance with requirements prescribed by the Commission. To implement the Congressional directive, AT&T incurred costs directly related to the implementation of LNP. These costs were scrutinized by the Commission under stringent cost recovery standards and approved. In the *Cost Recovery Order*, the Commission determined that a five-year cost recovery period was appropriate after balancing consumers' needs (specifically to keep both the charges and the recovery period reasonable) against carriers' interests (specifically timely cost recovery).<sup>75</sup> We are now faced with the fact that an unprecedented decline in access lines precluded the AT&T LECs from recovering a significant portion of their allowed implementation costs within that period. AT&T has estimated that the proposed exogenous cost adjustment would range from 24 to 37 cents and would last for two years in the Southwestern Bell region and one year in the Ameritech and PacBell regions.<sup>76</sup> We believe that allowing such limited additional recovery is consistent with the policy underlying the original five-year rule.<sup>77</sup> Specifically, it does not produce unreasonable charges for customers or impose them for an unduly long period. Accordingly, we find that special circumstances warrant a deviation from the rule in order to permit recovery of these costs through an exogenous adjustment to access charges.<sup>78</sup> The public interest will be served by permitting AT&T to recover these approved costs over a brief period in a manner that is competitively neutral and

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<sup>73</sup> See *Cost Recovery Order*, 13 FCC Rcd at 11773, para. 135.

<sup>74</sup> Accordingly, we reject commenters' arguments to the contrary. See NASUCA Reply at 5-8; OPC-DC Reply at 3. To address the concerns of the CPUC and OPC-DC that we verify AT&T's claimed unrecovered costs, we will, of course, require the AT&T LECs to file tariffs to make the exogenous adjustment. In those filings, AT&T must demonstrate the precise amount of LNP costs in fact recovered through end-user charges it imposed, its precise line counts over the recovery period, and thus the amount of unrecovered implementation costs. We note that AT&T has agreed to forego recovery for the disparity between treatment of PBX lines for LNP and EUCL purposes. Specifically, PBX lines qualify for nine LNP end-user charges, but only one EUCL. Compare 47 C.F.R. § 52.33 with 47 C.F.R. § 69.152. Accordingly, AT&T has agreed to forego additional recovery for 8 of 9 PBX lines upon which LNP end-user charges originally were imposed. See Letter from Michelle A. Thomas, Executive Director, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116 (filed April 18, 2006) (AT&T April 18 *Ex Parte* Letter).

<sup>75</sup> *Cost Recovery Order*, 13 FCC Rcd at 11776-77, paras. 143-44.

<sup>76</sup> See AT&T April 10 *Ex Parte* Letter Attachment at 8.

<sup>77</sup> *Cost Recovery Order*, 13 FCC Rcd at 11776-77, paras. 143-44.

<sup>78</sup> Thus we reject commenters' arguments that, as a price cap carrier, AT&T must demonstrate that its overall rates are too low and that its proposed additional recovery is unsupported by the *Cost Recovery Order*. See Ratepayer Advocate Comments at 4-5; NASUCA Reply at 4. In that Order, the Commission established a unique procedure, separate from the price cap process, to enable incumbent LECs to recover LNP implementation costs quantified by the carriers and specifically approved through Commission order. The requirement in the *Cost Recovery Order* that carriers project demand over the next five years resulted in a miscalculation causing significant under recovery for the AT&T LECs.

results in reasonable charges.<sup>79</sup>

#### D. Other Arguments

17. Finally, we reject certain arguments of commenters opposing the petition. First, we disagree with the Ratepayer Advocate that AT&T's petition is barred by the statute of limitations set forth in section 415(a) of the Act.<sup>80</sup> That section provides, in part, that "[a]ll actions at law by carriers for recovery of their lawful charges ... shall be begun, within two years from the time the cause of action accrues."<sup>81</sup> The Ratepayer Advocate argues that the statute of limitations expired on January 31, 2006 because the five-year recovery period ended on January 31, 2004.<sup>82</sup> Section 415(a), however, "refers to a suit instituted by a carrier in a district court of the United States to recover charges due from a customer subscribing to its service."<sup>83</sup> Thus, AT&T's petition is not governed by section 415(a).

18. We also reject the unsupported assertion by a single commenter, without citation of precedent or explanation, that allowing AT&T's proposed cost adjustment would constitute retroactive ratemaking.<sup>84</sup> As OPC-DC notes, the Commission determined that recoverable LNP costs included those costs associated with the creation of regional databases supporting number portability, initial upgrading of the public switched telephone network, as well as ongoing costs of providing number portability, such as the costs involved in transferring a telephone number to another carrier and routing calls under the N-1 querying protocol.<sup>85</sup> It is important to note that these costs were incurred by AT&T pursuant to a government mandate for the purpose of furthering competition in the telecommunications industry, not to improve the quality of AT&T's network. The benefits of LNP are long term benefits, which have accrued to and will continue to accrue to all telecommunications customers – past, present and future. To enable incumbent LECs to recover their costs in a timely fashion, to help produce reasonable charges for customers, and to avoid imposing those charges for an unduly long period, the Commission selected a five-year period for recovery of initial implementation costs of LNP.<sup>86</sup> End users did not, however, stop receiving the benefits of LNP upon the conclusion of the five-year recovery period. In particular, the end of the recovery period was not linked to the end of customer benefits in the same way that customer payments of amortized capital costs are generally linked to the useful life of the investment. When the unusual nature of these costs and benefits is considered in conjunction with the purpose of the investment and the unprecedented circumstances that led to under recovery, equity weighs in favor of providing AT&T relief. Thus, allowing recovery of AT&T's previously approved but unrecovered LNP costs would not violate the rule against retroactive ratemaking. Retroactive ratemaking occurs when purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for a commodity they

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<sup>79</sup> See 47 C.F.R. § 61.45(d). For these reasons we also waive the requirement that these costs be recovered exclusively through a separate monthly charge to be assessed over no more than five years. See 47 C.F.R. § 52.33(a).

<sup>80</sup> Ratepayer Advocate Comments at 3, 4 (citing 47 U.S.C. § 415(a)).

<sup>81</sup> 47 U.S.C. § 415(a).

<sup>82</sup> Ratepayer Advocate Comments at 3.

<sup>83</sup> *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. Alascom, Inc.*, File No. E-87-35, Memorandum Opinion and Order, 4 FCC Rcd 2472, 2474, para. 18 (Com. Car. Bur. 1989).

<sup>84</sup> See Ratepayer Advocate Comments at 3, 5.

<sup>85</sup> OPC-DC Comments at 3 (citing *Number Portability First Report and Order*, 11 FCC Rcd at 8399-400, paras. 91-92); see also *Cost Recovery Order*, 13 FCC Rcd at 11725, para. 38.

<sup>86</sup> See *Cost Recovery Order*, 13 FCC Rcd at 11777, para. 144.

already purchased.<sup>87</sup> Thus, an agency may not “surprise buyers, who paid the tariffed rate for a service, by telling them that they must now pay an increased price for past services.”<sup>88</sup> In this case, LNP is ongoing and continues to benefit existing end users. Allowing the exogenous treatment of LNP implementation costs does not constitute retroactive ratemaking.

19. Finally, we reject the argument that the shortened comment cycle period in this proceeding foreclosed adequate comment and therefore violates due process.<sup>89</sup> As several commenters note, the instant waiver petition seeks an alternative form of relief to an SBC petition asking the Commission to forbear from enforcing rule 52.33(a), which limits the LNP end-user cost recovery period to five years.<sup>90</sup> That petition, which was subsequently withdrawn, was subject to a May 8, 2006 statutory deadline.<sup>91</sup> This petition was subject to notice and comment as well as the Commission’s written and oral *ex parte* process. In its discretion, the Commission balanced the need to quickly assess and resolve the exogenous cost treatment of unrecovered carrier-specific LNP costs with its desire for additional public comment. Notwithstanding the abbreviated comment cycle, both industry and consumer interest representatives filed comments in this proceeding. Moreover, we note that AT&T, simultaneously with the filing of this petition, served the petition on commenters on AT&T’s earlier forbearance petition.<sup>92</sup> Accordingly, we find that there has been no due process violation.

#### IV. IMPLEMENTATION ISSUES

20. The *Cost Recovery Order* prohibited assessment of an LNP end-user charge on Lifeline customers.<sup>93</sup> Unlike the LNP end-user charge, EUCL charges are assessed on Lifeline customers. Lifeline customers do not, however, pay their own EUCL charges. Under our rules, for each Lifeline customer it serves, a price-cap carrier recovers from the federal universal service fund (Fund) an amount equal to the tariffed rate for the primary residential EUCL (Tier I support calculation).<sup>94</sup> AT&T has recognized that (1) the *Cost Recovery Order* prohibited assessment of an LNP end-user charge on Lifeline customers, and (2) it would be improper to seek reimbursement from the Fund for Lifeline customers for that portion of the EUCL that is attributable to LNP implementation costs.<sup>95</sup> Accordingly, we prohibit AT&T from seeking recovery from either Lifeline customers or the federal Lifeline support mechanism for that portion of the EUCL that is attributable to the exogenous cost increase authorized by this waiver. Instead, to enable AT&T to recover the amounts allowed in this waiver, we permit AT&T to increase its allowed exogenous adjustment to account for the fact that it will not recover the portion of the EUCL attributable to LNP costs from its Lifeline customers. Commission staff will review all the AT&T

<sup>87</sup> See *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C. Cir. 1987).

<sup>88</sup> *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 78 (1<sup>st</sup> Cir. 2002).

<sup>89</sup> See CPUC Comments at 3; Caswell Comments; Ratepayer Advocate Comments at 2-3.; NASUCA Reply at 2-3.

<sup>90</sup> AT&T/SBC Forbearance Petition at para. 5, *cited in* CPUC Comments at 2; Ratepayer Advocate Comments at 1-2; NASUCA Reply at 2; OPC-DC Reply at 2-3.

<sup>91</sup> See *Petition of SBC Communications Inc. for Forbearance Under 47 U.S.C. § 160(c) from the Application of the Five-Year Recovery Period for Local Number Portability Costs Under 47 C.F.R. § 52.33(a)(1)*, CC Docket No. 95-116, Order, 21 FCC Rcd 209, 210, para. 5 (Wireline Comp. Bur. Jan. 20, 2006). AT&T withdrew its forbearance petition on April 17, 2006. See Letter from Jim Lamoureux, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116, (filed April 17, 2006).

<sup>92</sup> See AT&T April 18 *Ex Parte* Letter.

<sup>93</sup> *Cost Recovery Order*, 13 FCC Rcd at 11777-78, para. 145

<sup>94</sup> 47 C.F.R. § 54.403(a)(1).

<sup>95</sup> See AT&T April 18 *Ex Parte* Letter; see also *Cost Recovery Order*, 13 FCC Rcd at 11777-78, para. 145.

adjustments discussed herein for accuracy in the course of the tariff review process.

21. Because this Order temporarily allows AT&T's tariffed EUCL rate to include an exogenous cost adjustment to recover LNP costs, we also find that good cause exists to waive section 54.403(a)(1) of our rules to the extent the rule allows AT&T to recover for Tier I Lifeline support the "tariffed rate in effect for the primary residential End User Common Line charge" as determined in section 69.152 of our rules.<sup>96</sup> Instead, and as a condition of the grant of this exogenous cost adjustment, we direct AT&T for purposes of recovery from the Fund for its Lifeline customers to use the EUCL rate minus the per-line exogenous cost adjustment to recover LNP costs as long as such exogenous cost adjustment is in effect. As discussed above, AT&T has stated that the exogenous cost adjustment to recover LNP costs will last two years in the Southwestern Bell region and one year in the Ameritech and PacBell regions. During those time periods and in those regions, AT&T shall use the EUCL rate minus such per-line exogenous cost adjustment when filing the FCC Form 497 seeking recovery for its Lifeline customers. At the termination of the exogenous cost recovery granted in this Order, this waiver expires and AT&T will recover federal universal service support for its Lifeline customers in accordance with our rules.

## V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 201-205, 251, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, 251, and 332, and section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, AT&T Inc.'s Petition for a Waiver to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d) of the Commission's rules, 47 C.F.R. § 61.45(d), IS GRANTED to the extent provided herein and IS OTHERWISE DENIED.

23. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), and 254, and section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, section 54.403(a)(1) of the Commission's rules, 47 C.F.R. § 54.403(a)(1), IS WAIVED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>96</sup> 47 C.F.R. § 69.152.